MEMORANDUM

TO: Foundational Provision Subcommittee Members

FROM: Jim Tomkovicz, Chair

RE: Actus Reus and Mens Rea

DATE: July 3, 2008

I. INTRODUCTION

The two most basic, fundamental topics in criminal law are the Actus Reus (Guilty Act) and Mens Rea (Guilty Mind) Requirements. The object of this memo is to summarize the state of the law and to highlight the issues that statutory provisions on these subjects can, do, and/or should address. The hope is that these summaries will expedite discussions and facilitate subcommittee decisions.

II. THE ACTUS REUS/GUILTY ACT REQUIREMENT

A. The Basic Rule and Some Issues

The actus reus or guilty act requirement is the first essential for criminal liability. The demand for an "act" is universal and is absolute—that is, there are no exceptions. The basic rule is that there is no criminal liability without a guilty act. This rule means first that no one is punishable for his or her thoughts/bad intent alone. Second, it encompasses the "voluntariness" requirement. An act that is not voluntary cannot be the basis of criminal liability. Another issue that arises is whether a "failure to act" or "omission" can be the basis for criminal liability.

Issues involving this requirement do not arise frequently. The acts required are typically specified by (or implicit in) the crime at issue. Questions of voluntariness are seldom encountered in actual cases. If a crime contemplates liability for an omission, it is usually clear. Otherwise, Anglo-American case law has identified situations where one can be liable for an omission even though a crime does not specifically prescribe liability for an omission.

B. The Model Penal Code Provision

Section 2.01 of the MPC deals with the act requirement.

- In 2.01(1), it sets forth a *rule requiring a voluntary act for criminal liability* (i.e., both *an act* (defined elsewhere as "a bodily movement") and *voluntariness*).
- In 2.01(2), it specifies what acts are *not* voluntary (thus, anything not specified *is* voluntary and a potential basis for liability).

- In 2.01(3), it tells when one can be liable for an *omission*.
- And in 2.01(4), it declares that *possession* qualifies as an act under certain conditions.

C. State Law

According to my research assistants' surveys, 28 states have statutes addressing actus reus and 22 (including Iowa) have no statute specifying the requirement or addressing the issues that arise. At least 20 of the 28 have provisions like/based on MPC 2.01. The fact that a state has no statute does not mean that there is no requirement. The voluntary act requirement in inherent in the criminal law and is recognized as a fundamental in every jurisdiction. The specific issues covered by 2.01 must be resolved by the courts when they are not addressed by the legislature.

D. Iowa Law

- *Voluntariness*: Iowa apparently roots the "voluntary act" requirement in the "general intent" requirement which demands that a defendant "was aware he was doing the act and did it voluntarily, not by mistake or accident." *State v. Philpott*, 695 N.W.2d 503 (2005); Iowa Crim. Jury Inst. 200.1 (2005). There is no definition of voluntariness found in the cases. Some involuntary acts have been dealt with under the insanity defense (see *State v. Wright*, 84 N.W. 541 (1900)(epileptic seizure); *State v. George*, 18 N.W. 298 (1884)(seizure)) or guilty mind requirement (see *State v. Petsche*, 219 N.W.2d 716 (1974)(reflex negates specific intent).

- *Omissions*: Iowa's treatment of omissions is minimal, recognizing by statute that: "The term 'act' includes a failure to do any act which the law requires one to perform." Iowa Code Annotated § 702.2 (2008)

- *Possession*: Of course, Iowa does recognize possession as a criminal act. *State v. Reeves*, 209 N.W.2d 18 (1973).

E. Questions/Issues

The first and most basic question that the subcommittee must address is whether to recommend adoption of an actus reus provision, that is, a provision that specifies that criminal liability requires a *voluntary act*. If the answer is affirmative, there are several issues that arise and must be confronted:

1. Definition of "an act". Do we want to specify that an act is "a bodily movement"?

2. Voluntary *and* Involuntary Acts: Phrasing of the requirement to ensure that the fact that one act is involuntary does not necessarily preclude criminal liability. The MPC language "conduct which *includes* a voluntary act or omission" is intentional to make it clear that even though an accused has committed an involuntary act as part of his or her course of

conduct, liability is not precluded *if* he or she also has committed an (earlier) voluntary act (or omission) that led to/caused the involuntary act. For example, if a person has a seizure while driving and kills a pedestrian, he *may be* liable for the voluntary act of getting behind the wheel. Or if a diabetic person develops low blood sugar that causes a convulsion, she *may be* liable for a failure to eat sufficient food.

3. Definition of voluntariness—possibilities: The MPC does it negatively in 2.01(2), by defining what is *not voluntary*—first listing some very specific categories (e.g., reflex, sleep, hypnosis) and then including a general category for comparable acts (other acts that are not the product of the conscious or habitual effort or determination of the person—see 2.01(2)(d)). Some of the state statutes omit definitions (see Texas, Colorado). Delaware, for example, attempts an affirmative definition of what *is* voluntary. The basic idea in the law is that a person should not be blamed unless the movement of his body is something he is responsible for and that there is no point in trying to deter acts when a person is not capable of doing otherwise (i.e., deterrence will not work). The essence of voluntariness is awareness of the bodily movement and sufficient control over the bodily movement (or, for an omission, being "physically capable" of doing the act that one is charged with failing to do—see MPC 2.01(1)). Acts are not voluntary only in extreme circumstances where a person is not at all aware or is aware of his bodily movement but cannot do otherwise because of a lack of control/volition). An act done out of habit may not be in something the individual is thinking about, but it is something he can think about and control—so habitual actions (see MPC 2.01(2)(d); see Delaware code) are considered voluntary.

4. Relationship to Insanity/Involuntary Acts and Mental Disease or Defect: None of the statutes deal with the question of whether an involuntary act that is the product of a mental disease or defect can exculpate like an involuntary act from any other cause. Cases split over this issue. Some say that if the act is involuntary, it cannot be the basis for conviction no matter the source—i.e., whether caused by a mental disease, a physical disease/disorder, or an external cause. Others say that if the involuntary act is rooted in a mental disease or disorder, then the accused may only be exculpated on ground of insanity, not a lack of a voluntary act. These force a choice between an insanity defense (and commitment, if acquitted by reason of insanity) and no defense at all.

5. Omissions: The MPC in 2.01(3) mirrors longstanding, traditional Anglo-American law by providing that generally there is no criminal liability for a failure to act. There are two situations in which liability is possible, however: (1) when a legislature defines a crime as committed by a failure to do something (e.g., failure to pay taxes, to register as a sex offender, etc.) and (2) when the law recognizes that an individual has a legal duty to act (e.g., a parent has a duty to safeguard/provide for a child) and the individual's failure to do so causes a result that, if caused actively by anyone, constitutes an offense (e.g., death results from the failure to act). No statute that has been uncovered specifies the situations in which there are such legal duties. Instead, it is left to evolutionary development in the

courts.

6. Possession: Like the MPC, some statutes deal with the circumstances in which possession constitutes an act. One statute (Arkansas's) specifies that "speech" can be an act.

F. Recommendations

The chair would recommend, at a minimum, the following:

> Endorsement of a general *voluntary act requirement* with language that ensures coverage of the voluntary and involuntary act situations.
> Specification of a definition of act and of omission and a *general definition* of what is involuntary or voluntary.
> Endorsement of the general approach to *omissions*, and specification of the two situations in which liability for failure to act is possible.
> Possibly, the specification that possession is an act under certain circumstances.

The chair would also recommend that any provisions recommended by the subcommittee be accompanied by some brief explanatory comments.

III. THE MENS REA REQUIREMENT

A. The Basic Rule and Some Issues

The mens rea or guilty mind or "culpability" requirement is the second essential for criminal liability. The demand for an guilty mind is universal, but does have exceptions known as "strict liability" crimes (e.g., traditionally statutory rape requires no guilty mind for the "age" element of the offense). The basic modern rule is that there is no criminal liability without a guilty mind/mental state with respect to each essential element of a criminal offense. Putting aside strict liability, what this means is that each statutory offense(whether specified clearly in the statute or not) includes a mental component that must be proven with respect to every element of that offense.

Issues involving this requirement *do* arise frequently. One longstanding problem is identifying the mens reas required for crimes/elements of crimes. Another is defining what those mens rea mean. There are also a number of other, more specific, problems that arise in interpreting criminal offenses.

B. The Model Penal Code Provision

Section 2.02 is the most significant and impressive provision in the MPC and probably the one that has had the most pervasive influence on American criminal law. It uses the term "culpability" instead of mens rea or guilty mind or mental state. It accomplishes a number of

important objectives:

- In 2.02(1), it declares the basic rule that except when there is specific provision for strict liability (except in Section 2.05), some culpability is required for every element of a crime. Note that this rule does not say *what* is required for any element of any crime—leaving that up to the legislative definition of each particular offense. It essentially declares the general rule is proof of a guilty mind (at least (gross) negligence) for each element of every crime.
- In 2.02(2), it *identifies* four necessary and sufficient culpabilities for a criminal code and it *defines* each of them. Note they begin with the most culpable (purpose) and run through the least culpable (negligence). The reason for the complicated definitions of purpose and knowledge are merely linguistic—the same words will not work for different kinds of elements. Note also that as it is defined in 2.02(2)(d), "negligence" is, in keeping with the general approach of the criminal law, *not* ordinary, civil negligence—but is *gross negligence* (also sometimes known as criminal or culpable negligence).
- In 2.02(3), it addresses the question of statutory silence regarding culpability for an element. If a provision like this is adopted and a legislature then does not specify what is necessary/sufficient, then recklessness is presumed to be enough (anything more culpable will be more than enough) and negligence is presumed. This is a guide for courts that would otherwise have to figure out what the mens rea is for a "silent" crime.
- In 2.02(4), the MPC addresses how to interpret a statute that has a single mental state/culpability and is followed by more than one element, prescribing that it applies to all of those elements unless there is some clear indication it is not supposed to apply to all.
- In 2.02(5), the MPC says proof of a more culpable state of mind than a crime requires will always be sufficient.
- In 2.02(6), it adopts the general rule that if a person has a purpose to do something only if a condition is met (and not if that condition is not met), it generally will satisfy the requirement of purpose.
- 2.02(7) fleshes out and expands the definition of knowledge.
- 2.02(8) defines a common, unclear mens rea term that appeared in prior codes and gives it MPC meanings.
- 2.02(9) actually adopts the traditional rule that "mistake of law"is not a defense, specifying that defendants do not have to have guilty minds regarding whether what they are doing is a crime or what a crime means or whether a provision applies to their conduct.
- 2.02(10) is a special rule for crimes that are graded more or less seriously based on the level of culpability proven and specifies that grading will be no more serious than the "lowest" level of mens rea proven for any element.

C. State Law

According to my research assistants' surveys, 37 states have statutes addressing mens rea. Of

those 27-32 are MPC based and 5 are quite different. 13 states (including Iowa) have no statute specifying the requirement or addressing the issues that arise. The fact that a state has no general mens rea statute, of course, does not mean that there is no requirement. Mens rea is an accepted component of criminal law and liability, an essential. When issues are not addressed by the legislature, courts are left to wrangle with and attempt to settle them.

D. Iowa Law

- Iowa does recognize the need for guilty minds and does recognize the need to interpret statutes to discern what is required for conviction and whether the legislature has intended an exception to the general rule—i.e., strict liability. (See *Eggman v. Scurr*, 311 N.W.2d 77 (1981); *State v. Ramos*, 149 N.W.2d 862, 865 (1967).) There is law suggesting that when the statutory provision does not make the mens rea clear, courts should look to what was required by the *common law* definition of the offense. (See *State v. Conner*, 292 N.W.2d 682 (1980).)
- There is considerable case law in Iowa discussing the distinction between *general intent* and *specific intent* and there are jury instructions reflecting these attempted distinctions. Sometimes the meanings of these terms are somewhat clear, at other times, they are murky.
- Iowa law has a single statutory provision that is pertinent—a definition of "reckless" in Iowa Code section 702.16. The definition is not particularly helpful and is not comprehensive (applying only to the safety of persons or property). The case law and jury instructions on recklessness are quite confused and confusing. (See *State v. Conner*, 292 N.W.2d 682 (1980); Iowa Criminal Jury Instruction § 200.20.)
- Case law and a jury instruction defines "knowledge" as "conscious awareness." (See Iowa Criminal Jury Instruction § 200.3 (2005); *State v. Leckington*, 713 N.W.2d 208 (2005).) But there is also case law suggesting that there is no fixed meaning to the term and that it varies from statute to statute. (See *State v. Winders*, 366 N.W.2d 193 (Ct. App. 1985).)
- The jury instructions define "malice" in an unhelpful, incomplete, and potentially too narrow way. (See Iowa Criminal Jury Instruction § 200.19.)
- "Willfully" is defined in case law as "ordinarily" meaning "intentionally, deliberately, or knowingly, as distinguished from accidentally, inadvertently, or carelessly." *State v. Wallace*, 145 N.W. 2d 615 (1966). In another opinion, willfully is defined as "an intentional, voluntary act." (See *State v. Osborn*, 368 N.W.2d 68 (1985).) Apparently, willfulness is a common requirement in Iowa crimes.
- There is some discussion of criminal negligence, but it is tangled with recklessness and far from clear. (See *State v. Conner*, 292 N.W.2d 682 (1980).)
- Intent is said to mean "design or purpose." *State v. Hickman*, 623 N.W.2d 847 (2001). One case says that acting voluntarily satisfies the requirement of purpose. (See *State v. Neuzil*, 589 N.W.2d 708 (1999).)

It seems fair to say that Iowa law on mens rea, as developed by the courts, is not at all comprehensive and has many unclarities. There is considerable room for improvement in these respects.

E. Questions/Issues

The first and most basic question that the subcommittee must address is whether to recommend adoption of an general mens rea/culpability provision, that is, a statute that specifies that criminal liability generally requires a guilty mind/culpability for every element of an offense that legislature does not intend to be strict liability. The second basic question is whether to recommend identification of and (consistent) definition of a closed universe of mental states/guilty minds/culpabilities. This will have enormous impact on the definition of specific crimes. If so, a number of interpretative issues arise and might be dealt with, including:

1. Should we recommend a "default" culpability provision for construing silent statutes (see MPC 2.02(3))?
2. Should we recommend a presumption that specified mens rea applies to all elements that follow (see MPC 2.02 (4))?
3. Should we recommend a declaration that more culpable states of mind will always suffice (see MPC 2.02(5))?
4. Should we address the problem of "willful blindness" or "deliberate ignorance" directly in the statute or leave it to the courts?

F. Recommendations

The chair would recommend, at a minimum, the following:

> Endorsement of a general mens rea/culpability *requirement* like that in the MPC *Specification* and *Definition* of possible mental states to be incorporated into crimes—starting from and editing the MPC definitions. The embellishments of purpose and knowledge in the later subsections of the MPC (sections 2.02(6) and (7)) could be incorporated into the definitions of those terms. The concepts of general and specific intent should be eliminated as unnecessary and confusing for courts and jurors.
> Serious consideration of incorporating the three general interpretive rules in 2.02(3), (4), and (5).
> Passing consideration of whether there is any need to define willfulness (2.02(8)), address the issue of mistake of law (2.02(9)), or confront the grading problem (2.02(10)) in a general mens rea provision.

The chair would also recommend that any provisions recommended by the subcommittee be accompanied by some brief explanatory comments.